

**BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO**

In the Matter of the Protest of

[Redacted],

Petitioner.

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) DOCKET NO. 0-894-613-504 & 0-071-309-312  
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) DECISION  
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On September 27, 2018, the Sales, Use and Miscellaneous Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued two Notice of Deficiency Determinations (Notices) to [Redacted] (Petitioner), for the period of August 1, 2017, through August 31, 2017, proposing sales tax, use tax, penalty, and interest in the total amount of \$9,707, and withholding tax, penalty, and interest, in the total amount of \$6,618.

On November 28, 2018, Petitioner filed a timely appeal and petition for redetermination of the Notices. The Commission sent Petitioner hearing rights letters dated May 23, 2019, and September 4, 2019. However, Petitioner has not requested a hearing or provided additional documentation for the Commission's consideration.

The Commission reviewed the audit file and upholds both Notices for the reasons that follow.

**Background and Audit Findings**

Petitioner is a construction company headquartered in [Redacted], Montana with no business locations in Idaho. Petitioner performs the following types of work: interior plaster, masonry, tile, stucco, and exterior insulation and finish systems (EIFS). EIFS is a lightweight wall covering that includes foam plastic insulation and thin synthetic coatings.

In August 2017, Petitioner was subcontracted to supply and install EIFS for a new [Redacted] ([Redacted] Project) in [Redacted], Idaho. The total contract price for the completion of this

project was \$268,672.66. The Bureau conducted a limited scope audit to determine Petitioner's sales tax, use tax, and withholding tax compliance for this project.

On three occasions, the Bureau requested information from Petitioner regarding the equipment and materials installed or used during the performance of its contract. However, Petitioner did not respond. Since Petitioner did not provide the requested information, the Bureau computed the sales tax and use tax liability based on industry averages for contracts of this nature, using 55% of the total contract price to calculate the cost of materials that Petitioner used for the [REDACTED] Project. The Bureau estimated the materials to be \$147,769.96 and held this amount subject to use tax, at the rate of 6%. As a result, the sales tax and use tax liability is \$8,866.

The Bureau also requested payroll information from Petitioner on three occasions, but Petitioner did not respond. Since no payroll information was provided, the Bureau computed Petitioner's withholding tax liability based on industry averages for contracts of this nature, using 45% of the total contract price to calculate Petitioner's wages. Using this calculation, the Bureau estimated Petitioner's wages to be \$120,902.70. The Bureau then held these wages subject to withholding tax, at the rate of 5%, resulting in a liability in the amount of \$6,045.

On June 19, 2018, the Bureau sent Petitioner a billing letter for the use tax and the withholding tax based on their estimates. Petitioner did not respond to the bill. Therefore, the Bureau issued the Notices.

Petitioner protested both Notices, claiming it would provide documentation for the [REDACTED] Project. However, Petitioner provided no information for the Bureau's review. The Bureau then sent Petitioner's protest to the Appeals Unit for administrative review.

## **Relevant Tax Code and Analysis**

### ***A. Sales and Use Tax Liability***

All persons engaged in constructing, altering, repairing or improving real estate, are consumers of the material used by them. All sales of tangible personal property to contractors are taxable whether or not they intend to resale the improved property. *See* Idaho Code § 63-3609 and IDAPA 35.01.02.012.01.

Use tax is imposed on the storage, use, or other consumption in this state of tangible personal property, unless an exemption applies. The use tax is complementary to the sales tax, which is imposed on the retail sale of tangible personal property within Idaho. The use tax liability may be extinguished when sales tax has been paid to Idaho. To document Idaho tax was paid, the purchaser may provide a receipt from the retailer. *See* Idaho Code § 63-3621.

Idaho Code § 63-3624(e), authorizes the Commission to examine books, papers, records, and equipment of any person liable for sales tax or use tax and investigate the character of any person's business in order to verify the accuracy of any return made, or, if no return is made by the person, to ascertain and determine the amount required to be paid.

In this case, Petitioner filed no return and provided no documentation, during the audit or appeals process, showing tax was paid on the materials and equipment used to complete the [REDACTED] Project. Consequently, the Commission finds the Bureau's sales tax and use tax calculation to be reasonable.

### ***B. Withholding Tax Liability***

The state of Idaho's withholding tax is levied in Idaho Code § 63-3035(a). It states in relevant part,

“Every employer who is required under the provisions of the Internal Revenue Code to withhold, collect and pay income tax on

wages or salaries paid by such employer to any employee (other than employees specified in Internal Revenue Code section 3401(a)(2)) shall, at the time of such payment of wages, salary, bonus or other emolument to such employee, deduct and retain therefrom an amount substantially equivalent to the tax reasonably calculated by the state tax commission to be due from the employee under this chapter.”

Idaho Code §§ 63-3017 and 3018 define employer and employee to parallel the Internal Revenue Code’s (IRC) definitions of employer and employee. IRC Chapter 24 § 3401, states in pertinent part:

(c) For purposes of this chapter, the term “employee” includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term “employee” also includes an officer of a corporation.

(d) For purposes of this chapter, the term “employer” means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that—

(1) if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term “employer” (except for purposes of subsection (a)) means the person having control of the payment of such wages, and

(2) in the case of a person paying wages on behalf of a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, the term “employer” (except for purposes of subsection (a)) means such person.

To determine whether Petitioner properly paid withholding taxes, the Bureau requested additional information repeatedly. Since Petitioner did not provide documentation showing withholding taxes were properly paid, the Bureau used the best information it had available to determine the withholding tax liability. The Commission reviewed the Bureau’s withholding tax calculation and finds it to be reasonable.

### Conclusion

On appeal, a deficiency determination issued by the Commission “is presumed to be correct, and the burden is on the taxpayer to show that the Commission’s decision is erroneous.” *Parker v. Idaho State Tax Comm’n*, 148 Idaho 842, 845, 230 P.3d 734, 737 (2010) (citing *Albertson’s Inc. v. State Dep’t of Revenue*, 106 Idaho 810, 814, 683 P.2d 846, 850 (1984)). The Commission requires Petitioner to provide adequate evidence to establish that the amounts asserted in the Notices are incorrect. Here, Petitioner did not provide adequate evidence. As a result, the Commission upholds the Notices.

Absent information to the contrary, the Commission finds the Notices prepared by the Bureau to be an accurate representation of Petitioner’s sales tax, use tax, and withholding tax liabilities for the period of August 1, 2017, through August 31, 2017.

The Bureau added penalty and interest to the sales tax, use tax, and withholding tax deficiencies. The Commission reviewed these additions and finds they are appropriate per Idaho Code §§ 63-3045 and 3046. The interest was updated accordingly. Interest is calculated through February 28, 2020 and will continue to accrue at the rate set forth in Idaho Code § 63-3045(6), until paid.

THEREFORE, the Notices dated September 27, 2018, are hereby APPROVED, in accordance with the provisions of this decision, and are AFFIRMED and MADE FINAL.

IT IS ORDERED that Petitioner pay the following tax, penalty, and interest:

<u>TYPE</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
Sales and Use	\$8,866	\$443	\$930	\$10,239
Withholding	\$6,045	\$302	\$633	\$6,980
TOTAL DUE:				<u>\$17,219</u>

DEMAND for immediate payment of the foregoing amount is hereby made and given.

An explanation of Petitioner's right to appeal this decision is included with this decision.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

IDAHO STATE TAX COMMISSION

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COMMISSIONER

## CERTIFICATE OF SERVICE

I hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_, 2019 a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[Redacted]

Receipt No.